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No.

In The

Supreme Court of the United States

October Term, 1994

ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Defendants.

No. 3:93-CV-0163-T

(Filed Feb. 22, 1993)

ORDER DENYING PLAINTIFF'S MOTION TO REMAND AND GRANTING WITH PREJUDICE DEFENDANTS' MOTION TO DISMISS

This matter is before the court on the motion to remand, filed by Plaintiff on February 11, 1993, and the motion to dismiss, filed by Defendants on January 27, 1993, and again on February 8, 1993.[1] Plaintiff filed a response to Defendants' motion to dismiss on February 16, 1993. Having considered the motions, the response, and applicable legal authority, the court is of the opinion

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[1] It appears that Defendants refiled their motion to correct typographical errors, and to add the case docket number to the motion.

that (1) Plaintiff's motion to remand should be denied; and (3) [sic] Defendants' motion to dismiss should be granted.

Background

On September 23, 1992, Plaintiff filed this action against Defendants in the 14th Judicial District Court of Dallas County, Texas. Plaintiff filed a first amended petition on January 8, 1993. On January 25, 1993, Defendants removed the case to federal court on the basis of federal question jurisdiction.

Plaintiff's first amended petition alleges that on October 23, 1991, Andrew Gaston was attending A. Maceo Smith High School in Dallas, Texas. While at the school, a fight broke out between students and Drumestic Contreal Brown. Brown was neither a student nor authorized to be present on school property. When students attempted to evict Brown from school property, Brown pulled out a handgun and shot Gaston in the head. Gaston subsequently died from his injuries.

Plaintiff asserts a federal claim against Defendants for violation of 42 U.S.C. § 1983, and seeks damages.

Plaintiff now seeks to remand this cause to state court on the ground that Defendants failed to timely remove this action in compliance with 28 U.S.C. § 1446.

Defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

Rule 12(b)(6) Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claim or claims stated in the complaint. The court must decide whether the facts alleged, if true, would entitle Plaintiff to the legal remedy requested. Unless the answer is unequivocally "no," the motion must be denied. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Many courts view Rule 12(b)(6) motions with "disfavor" because of the role pleadings play in federal practice and the liberal policy regarding amendment: "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir. 1982) (quoting Wright & Miller, Federal Practice & Procedure: Civil § 1357 at 598 (1969)).

The Fifth Circuit has established two primary considerations in determining the propriety of a Rule 12(b)(6) motion. First, the court must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the plaintiff; however, the court will not accept as true conclusory allegations in the complaint. *Id.* Second, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. *Id.*

Discussion

I. Plaintiff's Motion for Remand

Plaintiff asserts that remand is appropriate because Defendants failed to comply with removal procedures under 28 U.S.C. § 1446. Specifically, Plaintiff asserts that

(1) the original petition, filed on September 23, 1992, establishes a federal civil rights action under 42 U.S.C. § 1983; and (2) Defendants did not file their notice of removal within thirty days after receipt of a copy of Plaintiff's initial pleading.

Pursuant to 28 U.S.C. § 1446(b), if the case stated by the initial pleading is removable, a notice of removal must be filed within thirty days after the defendant receives a copy of the initial pleading. If the case stated in the initial pleading is not removable, a notice of removal may be filed within thirty days after defendant receives a copy of an amended pleading, or other document "from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

A federal question is not established from the face of Plaintiff's initial petition. However, Plaintiff's amended petition, filed on January 8, 1993, clearly alleges a violation of 42 U.S.C. § 1983. The court is of the opinion that Defendants were not placed on notice that the case was removable until Plaintiff filed his first amended petition. Defendants filed their notice of removal within thirty days after receiving a copy of Plaintiff's amended petition. Therefore, Defendants' removal petition was timely, and Plaintiff's motion for remand should be denied.

II. Defendants' Motion to Dismiss

A. 42 U.S.C. § 1983 Claim

Defendants assert that Plaintiff's § 1983 claim should be dismissed because Plaintiff fails to allege deprivation of a valid constitutional right. The court agrees. The Fourteenth Amendment protects against deprivations of

life without due process of law committed by state actors but does not protect against deprivation of life committed by private actors. *Arroyo v. PLA,* 748 F. Supp. 56 (D. Puerto Rico 1990); *DeShaney v. Winnegabo County Dept. of Social Serv.,* 489 U.S. 189 (1989). A state has no affirmative constitutional duty to protect citizens from other citizens. *Arroyo,* 748 F. Supp. at 59. Because Plaintiff's § 1983 claim is based upon deprivation of life committed by a private actor and not by the state, Plaintiff has failed to sufficiently allege a constitutional violation.

Plaintiff responds that because Gaston's personal liberty was restrained through state compulsion to attend A. Maceo Smith High School, this case falls within one of the "limited circumstances" recognized in *DeShaney* as a departure from the general rule. The court does not agree. In *Arroyo,* the court rejected a similar argument and stated that the determining factor for liability is whether the death was caused by the state rather than a private actor. *Id.* at 59-60.

Defendants further assert that dismissal is appropriate because Plaintiff has pleaded only conclusions to support his § 1983 claim, and has pleaded no facts to overcome Defendant Donnie Breedlove's qualified immunity defense. Defendants are correct in their assertions. Complaints containing conclusory allegations will not survive a motion to dismiss. *See Streetman v. Jordan,* 918 F.2d 555, 557 (5th Cir. 1990).

Although Plaintiff has pleaded some facts concerning the incident which allegedly caused Gaston's injuries, Plaintiff has failed to include specific facts (1) to establish a policy or custom undertaken by Dallas Independent

School District which caused Gaston's death; and (2) to establish that Defendant Donnie Breedlove's qualified immunity cannot be sustained.

Based upon the above reasoning, Plaintiff's § 1983 claim should be dismissed with prejudice.

Having determined that Plaintiff's § 1983 claim should be dismissed, the court will not address Defendants' remaining grounds for dismissal of the § 1983 claim.

B. State Law Claims

Defendants assert that Plaintiff's state law claims are grounded in tort and should be dismissed because Plaintiff has failed to allege facts which would overcome Defendants' sovereign immunity defenses.

It is not clear from the first amended complaint that Plaintiff is asserting state law tort claims against Defendants. However, to the extent that Plaintiff's suit is grounded in tort, it is barred by Defendants' governmental immunity. *See* Tex. Civ. Prac. & Rem. Code Ann., § 101.021; *Myrtle Springs Reverted Independent School Dist. v. Hogan*, 705 S.W.2d 707 (Tex. Civ. App. – Texarkana 1985 writ ref'd n.r.e.).

It is therefore **ORDERED** that the Motion to Remand, filed by Plaintiff on February 11, 1993, is denied.

It is **FURTHER ORDERED** that the Motion to Dismiss, filed by Defendants on January 27, 1993, and refiled on February 8, 1993, is granted with prejudice.

Signed this 19th day of February 1993.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT AND DONNIE BREEDLOVE,

Defendants.

No. 3:93-CV-0163-T

(Filed Feb. 22, 1993)

FINAL JUDGMENT

This action came on before the court on the motion to dismiss, filed by Defendants on January 27, 1993, and February 8, 1993, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered,

It is **ORDERED** and **ADJUDGED** that Plaintiff's claims against Defendants Dallas Independent School District and Donnie Breedlove are dismissed with prejudice.

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

Signed this 19th day of February 1993.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge